BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In re Applications of

STEPHEN O. MEREDITH

AL HAZELTON

For Construction Permit for a
New FM Station on Channel
243C1 in Audubon, Iowa

MM Docket No. 93-300

)   File No. BPH-920430MD
)
)   File No. BPH-920430ME

To: The Honorable John M. Frysiak
      Administrative Law Judge

PETITION FOR LEAVE TO FILE APPEAL

Al Hazelton ("Hazelton"), by his attorneys and pursuant to Section 1.301(b) of the Commission's Rules, hereby petitions the Presiding Judge for leave to file an appeal of his Memorandum Opinion and Order, FCC 94M-148, released March 11, 1994.[1] In support thereof, Hazelton states as follows:

1. Section 1.301(b) provides that leave may be granted to a party to file an interlocutory appeal if the matter involves a "new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception." Hazelton will show herein that these factors apply and require that an appeal be considered.

2. The matter at issue is whether the engineering portion of an application may be corrected by a certifying engineer between

---

[1] As indicated by the attached postmark, the MO&O was not mailed until March 16, 1994. Hazelton had only one day to prepare this filing.

the time that an applicant physically views the application and it is filed with the Commission. In this matter, there is no issue that the certifying engineer had, at the last minute, to correct his engineering work due to the discovery of a short-spacing problem. Further, it is not disputed that the applicant was fully briefed as to the point and the corrections being made.

3. What is at issue is the application of the Commission's opinion in **Edward W. St. John**, 67 RR 2d 774 (1990). The Presiding Judge has correctly held that the **St. John** case provides that engineering materials can be corrected subsequent to actual applicant review if the changes were minor. Hazelton has argued that a minor change involves anything other than the crucial factors of location, height, and power.

4. In considering the argument, the Presiding Judge applies the former "hard look" policies to argue that the correction was not minor. Hazelton submits that this is an incorrect reading of the "hard look" policies.

5. The "hard look" policy contains two components, tenderability and acceptability. **Statement of New Policy Regarding Commercial FM Applications That Are Not Substantially Complete or Are Otherwise Defective**, 58 RR 2d 166 (1985). An application that does not meet the tenderability requirements is immediately returned. One that is tenderable is accepted even if it has errors. These errors may be corrected by the applicant in the post-tender period so as to avoid return. **Amendment of Sections**

<u>73.3572 and 73.3573 Relating to Processing of FM and TV Broadcast</u>

<u>Applications</u>, 58 RR 2d 776, 784 (1985).

6. A short-spacing issue is not a tenderability defect. Rather, it is an acceptance issue that could be corrected by amendment. Under such circumstances, this was not a severe defect that would have ensured return of the application. Rather, it was a defect that could have been corrected.

7. <u>St. John</u> makes clear that a party is entitled to correct errors that it finds so long as they are minor. The error herein was a minor and otherwise correctable one involving potential short spacing. Hazelton submits that the issue of the reach of <u>St. John</u> is one that needs to be fully determined. Therefore, the Presiding Judge should allow an appeal where it is to be decided if <u>St. John</u> permits minor defects in broadcast applications to be corrected. In that there is a freeze on comparative hearings, there should be no concern over any delay that a permitted appeal would engender.

8. Finally, in regard to this appeal, recognition must be given to the comments of the Court of Appeals in <u>Bechtel v. FCC</u>, 10 F. 3d 875 (D.C. Cir. 1993), that the Commission must ask whether selection policies bear any reasonable connection with the results the Commission is seeking. Here, one must ask whether we are engaging in illusion when we ask whether there is any relevance to a layman's analysis of engineering rules when all parties defer to licensed professional engineers bearing degrees in electrical engineering. Clearly, the Commission must be asked to determine

3

why a layman's review of engineering work bears relevance to what party is selected as the station permittee.

9. In sum, this is a matter that calls out for appeal and review. <u>St. John</u> speaks to a recognition that engineering can be corrected to meet Commission standards. If such corrections were acceptable in the <u>St. John</u> case, why aren't they acceptable in this one, especially when the applicant was privy too and knew what was being corrected. Why there is an exaltation of form over substance is clearly an answer the Commission should provide.

WHEREFORE, it is respectfully requested that the appeal be sought herein be permitted.
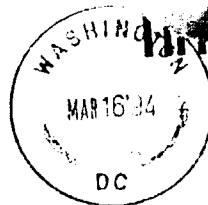
Respectfully submitted,

AL HAZELTON

By: _____

Barry A. Friedman
Semmes, Bowen & Semmes
1025 Connecticut Avenue, N.W.
Suite 500
Washington, D.C.   20036
(202) 822-8250

Dated: March 18, 1994

4

WASHINGTON
DC
MAR 16 '94

U.S. OFFICIAL MAIL
U.S. POSTAGE

PENALTY
FOR
PRIVATE
USE $300

00.29

H METER
438241

POSTAGE AND FEES PAID
FEDERAL COMMUNICATIONS
COMMISSION
FCC 655

93-300
Barry A. Friedman
Attorney
Semmes, Bowen & Semmes
1025 Connecticut Ave., NW
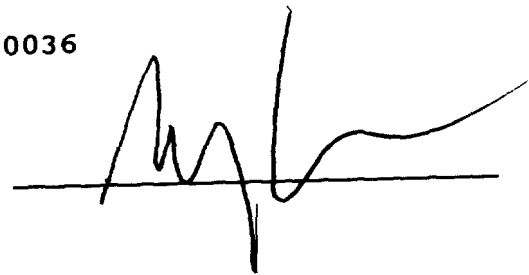Suite 500
Washington, DC   20036

CERTIFICATE OF SERVICE

I, Barry A. Friedman, do hereby certify that I have, on this 18th day of March, 1994, served a copy of the foregoing, "Petition for Leave to File Appeal," on the following parties by first-class mail, postage prepaid:

Hon. John M. Frysiak *
Administrative Law Judge
Federal Communications Commission
Room 223
2000 L Street, N.W.
Washington, D.C. 20554

Robert Zauner, Esq.
Hearing Branch
Mass Media Bureau
Federal Communications Commission
Room 7212
2025 M Street, N.W.
Washington, D.C. 20554

Gary Smithwick, Esq.
Smithwick & Belenduik
1990 M Street, N.W.
Suite 510
Washington, D.C. 20036

* By Hand